

LAY REPRESENTATION BEFORE BUREAU OF WORKMEN'S COMPENSATION HELD UNAUTHORIZED PRACTICE OF LAW

Special Master Comm'rs v. McCahan
83 Ohio L. Abs. 1 (C.P. 1960)

Can a lay person represent claimants before the administrative tribunals of the Ohio Bureau of Workmen's Compensation? The Stark County Common Pleas Court was faced with this query when the Special Master Commissioners, appointed by the same court to investigate unauthorized practice of law in the county, brought injunctive proceedings against the respondent. According to the court's findings of fact, the respondent had, for eighteen years, selected and prepared workmen's compensation forms for claimants, advised claimants of their rights under the law, attended hearings in a representative capacity, and effected the final disposition of claimants' legal rights under the Ohio workmen's compensation laws. Upon appeals taken to the Industrial Commission at Columbus, respondent's contracted claims were handled by a Columbus attorney with whom he had association. Sitting en banc, the three-judge court found that respondent's activities did constitute the practice of law and enjoined him "from all such actions and conduct."

Despite the restricted impact of the decree (not appealed and applicable only to the respondent), it has aroused interest among the organized Bar as a valuable precedent for those committees charged with the responsibility of curbing activities constituting the unauthorized practice of law.¹ For Ohio, the case was one of significance because it is the first to answer the question (posed above) since the major overhaul in 1955 of the workmen's compensation laws.² The current law is confused, and the need for clarification is great.

The Ohio statutes are silent as to the qualifications for a person appearing before the workmen's compensation tribunals in a representative capacity, except for Ohio Rev. Code § 4123.05 which gives the Industrial Commission the power to adopt "reasonable and proper rules" to facilitate the hearings. The last attempt by the Commission to regulate the practice by representatives was in February, 1953.³ The rules then required a license, to be issued if a prospective representative could demonstrate that he was 18 years of age, a citizen of good moral character with five character references, and possessed a knowledge of the law.⁴ In practice today, no license is required and seldom, if ever, are the representatives of any party to a hearing

¹ Stark County Bar Assoc. v. McCahan, 29 Vol. 26, U.P. News, No. 1, p. 28 (Spring, 1960).

² Ohio Rev. Code § 4121.12.

³ Rules for Practice Before the Industrial Commission of Ohio, p. 5 (Feb. 1, 1953).

⁴ *Ibid.*

asked their qualifications. "The Bureau and the Industrial Commission do not require representation nor do they interfere with representation."⁵

Notwithstanding Ohio Rev. Code § 4123.05, the Ohio Supreme Court has stated that the judiciary has the inherent power "to regulate, control, and define the practice of law."⁶

The practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.⁷

Utilizing the principle that sustains the above case, the Ohio Supreme Court declared in *Goodman v. Beall* in 1936:

One appearing or practicing before the Industrial Commission of Ohio in a representative capacity subsequent to the time a claimant first receives notice of the disallowance of his claim under Sec. 1465-90, General Code, is engaged in the practice of law, and prohibition will lie against such commission to prevent the appearance or practice before it on rehearing proceedings of any person other than an attorney at law, duly admitted to practice.⁸

However, this decision does not control today since its statutory basis has been completely renovated by the Ohio legislature. The court in 1936 was most impressed by provisions of the Ohio Gen. Code §§ 1465-90, which distinguished the non-adversary nature of the original hearing from the rehearing which was conducted "as in the trial of civil actions." Their holding in the case established a boundary between the two hearings for a lay representative, beyond which he could not pursue his contract claims.

Today the chain of allowance hearings has become much more complex with the addition of other appeal stages. An employer or employee may initiate a claim by making application to the Bureau of Workmen's Compensation on a standard form kept by all covered employers.⁹ The administrator (Deputy) will then order an investigation,¹⁰ and make a tentative award on the basis of any "compensable" injury found.¹¹ The employer has 10 days in which to object;¹² if he does object, the administrator will docket the claim for hearing.¹³ At this hearing, the administrator must al-

⁵ Handbook for Employees and Employers, Workmen's Compensation Act of the State of Ohio, p. 12 (1958).

⁶ *Judd v. City Trust & Savings*, 133 Ohio St. 81, 12 N.E.2d 288 (1937).

⁷ *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934).

⁸ *Goodman v. Beall*, 130 Ohio St. 427, 200 N.E. 470 (1936).

⁹ Ohio Rev. Code § 4123.07.

¹⁰ Ohio Rev. Code § 4123.512.

¹¹ Ohio Rev. Code § 4123.514.

¹² Ohio Rev. Code § 4123.514.

¹³ Ohio Rev. Code § 4123.515.

low "testimony and facts pertinent to the claim" to be presented, but does not need to prepare a record.¹⁴ Following this decision, either party may request "reconsideration" by the Administrator,¹⁵ or appeal as a matter or right to the regional board of review where the "testimony of witnesses and other evidence" may be introduced.¹⁶ The decision of the regional board of review constitutes the decision of the Commission unless an appeal is accepted by the Industrial Commission itself, at Columbus.¹⁷

The procedure is further complicated by Ohio Rev. Code § 4123.519 which allows appeals to be taken to the courts of common pleas. Effective November 2, 1959, a claimant may appeal an administrator's decision to the courts when an application for reconsideration is denied by the Administrator; and either the claimant or the employer may appeal to the courts from an adverse ruling by a regional board of review.

The reason for this elaboration of procedure is to distinguish the complex procedure under present law from that forming the basis of *Goodman v. Beall*,¹⁸ where there was only a hearing and a rehearing. To prevent the misapprehension that the Stark County Common Pleas Court could logically have drawn an arbitrary line between the original allowance hearing, the "reconsideration" hearing, or the hearing before a regional board, it should be noted that, aside from the appeal mentioned above, a "settlement" can be recommended to the Industrial Commission directly by an administrator upon application by the parties.¹⁹ Such a settlement made pursuant to the rules and regulations of the Commission operates like any other settlement between the parties, including the state fund.

The result of the foregoing analysis of the Ohio statutes precludes any selection of a boundary line between the various hearings which would not be completely arbitrary. The representation of parties at the hearings of the Bureau of Workmen's Compensation must, therefore, be held to constitute either the practice of law in its entirety, or not at all.

To hold that none of the practice within the Bureau is the practice of law would be a withdrawal from the position taken by most other jurisdictions.²⁰ Nevertheless, support for this position did emanate from the framers of the workmen's compensation laws.²¹ The Ohio Supreme Court has recognized that article II, section 35, Ohio Constitution (authorizing the establishment of workmen's compensation) was proposed because "it assures every worker compensation for injuries or death arising out of and in the course of employment, backed by state law and state administration without necessity for recourse to law suits or employment of attorneys or payment

¹⁴ Ohio Rev. Code § 4123.515.

¹⁵ Ohio Rev. Code § 4123.515.

¹⁶ Ohio Rev. Code § 4123.518.

¹⁷ Ohio Rev. Code § 4123.516.

¹⁸ *Supra* note 8.

¹⁹ Ohio Rev. Code § 4121.121(J).

²⁰ Annot., 111 A.L.R. 19 (1937); *cf.* Annot., 125 A.L.R. 1173 (1940); *cf.* Annot., 151 A.L.R. 781 (1944).

²¹ 35 Mich. L. Rev. 442 (1937).

of court costs."²² This view presupposes that the practice is simple enough to allow a claimant to process his own claim from inception to final settlement; however, the procedure for allowance hearings alone would be overwhelming to most uninitiated without assistance from some source. The State of Ohio embarked upon an educational program in 1958 via press releases featuring questions and answers, but it must be considered that in that same year, there were 3,200,000 covered employees throughout the state.²³ 763 employees of the Bureau cannot effectively counsel 343,187 claimants within a one-year period without outside assistance in the form of expert representation of the parties.²⁴

Considering that all 50 states and the federal government have similar programs;²⁵ that 39-40 million workers were protected by such legislation during an average week of 1955;²⁶ that Ohio requires 16 district offices, 5 regional boards of review, plus the Industrial Commission itself in Columbus to administer its law; it can be said that the Pennsylvania Supreme Court spoke with wisdom when it stated:

There has been such an enormous development in recent years of administrative and quasi judicial boards of all kinds, that, unless their proceedings and decisions are guided by persons learned in the history, development, and philosophy of legal principles, the decline may be very rapid from government characterized by supremacy of law to one of haphazard and arbitrary rule—a degeneration from liberty to oppression.²⁷

Regardless of one's opinion on the merits of the controversy, i.e., whether such representation is the practice of law, due to the interrelation of the procedural steps delineated above, it is imperative that the Ohio courts refrain from drawing an arbitrary line somewhere within the framework. This representation must entail either the practice of law from start to finish, or not at all.

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²² Goodman v. Beall, 130 Ohio St. 427, 429 (1936).

²³ Third Report of the Workmen's Compensation Advisory Council, State of Ohio (Feb. 11, 1959).

²⁴ First Report of the Workmen's Compensation Advisory Council, State of Ohio (Feb. 5, 1957).

²⁵ U.S. Dep't of Labor Bulletin 161 (Rev.), August, 1957.

²⁶ *Ibid.*

²⁷ Shortz v. Farrell, 327 Pa. 81, 193 Atl. 20 (1937).